



Agenda Date: 12/17/03
Agenda Item: Late Starter B

STATE OF NEW JERSEY
Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE BOARD'S)
REVIEW OF UNBUNDLED NETWORK)
ELEMENTS RATES, TERMS AND)
CONDITIONS OF BELL ATLANTIC-NEW)
JERSEY, INC.)

ORDER

DOCKET NO. TO00060356

(SERVICE LIST ATTACHED)

BY THE BOARD:

This Order memorializes action taken by the New Jersey Board of Public Utilities (Board) at its December 17, 2003 Agenda Meeting. At the Agenda Meeting, the Board announced its intention to reopen its review of two inputs, specifically, cost of capital and depreciation, which affect the rates at which Verizon New Jersey, Inc. (VNJ, formally known as Bell Atlantic-New Jersey, Inc.), is required to provide unbundled network elements (UNEs) to Competitive Local Exchange Carriers (CLECs) pursuant to the Federal Communications Commission (FCC) Local Competition rules. This action is the third in a series of reviews and investigations that began when the Board issued its first decision setting UNE rates on December 2, 1997.¹

BACKGROUND

In the *Generic Order*, the Board set its initial rates, terms, and conditions for access to UNEs consistent with the Total Element Long Run Incremental Cost (TELRIC) methodology articulated by the FCC in its Local Competition Order. Following the release of the Board's *Generic Order*, AT&T challenged the Board's decision in district

¹ See Decision And Order, *In the Matter of The Investigation Regarding Local Exchange Competition For Telecommunications Services*, Docket No. TX95120631 (Dec. 2, 1997) ("*Generic Order*").

court.² On June 6, 2000, the United States District Court for the District of New Jersey issued a decision that affirmed in part, reversed in part, and remanded in part issues addressed in the *Generic Order*.³

After careful consideration, the Board completed its review on November 20, 2001.⁴ The Final Order, issued March 6, 2002, adopted modified inputs and assumptions used in the cost models to calculate recurring and non-recurring rates, and established the terms and conditions under which certain advanced services would be made available to CLECs. The March 6, 2002 Final Order reduced many of the wholesale rates that VNJ had been charging CLECs pursuant to the *Generic Order*. Following the release of the Board's *Final Order*, WorldCom, AT&T and the Ratepayer Advocate (RPA) filed motions for reconsideration alleging that the Board had erred in rendering its decision. Having reviewed the reconsideration requests, the Board rendered its decision on reconsideration at its July 15, 2002 Agenda Meeting.⁵

Subsequent to the release of the Board's *Order on Reconsideration*, VNJ filed a Complaint in United States District Court for the District of New Jersey on November 7, 2002, pursuant to the Telecommunications Act of 1996 (47 U.S.C. §252(e)(6)).⁶ The Complaint was filed against both the Board and individual commissioners in their official capacities and consisted of three counts. In its Complaint, VNJ requested that the case be remanded to the Board for further review of the inputs and assumptions used to develop the UNE rates for compliance with the FCC's TELRIC methodology. Count One alleged that the UNE rates established by the Board failed to comply with the FCC's TELRIC methodology, as set out in the Act and its implementing regulations. Count Two alleged that the Board's UNE rates are below VNJ's actual costs and that they constitute an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. Count Three alleged that the Board's action further constituted a violation of VNJ's civil rights under 42 U.S.C. §1983. The Board filed an Answer to VNJ's Complaint on December 23, 2002.⁷

² See *AT&T Communications of New Jersey, Inc., et al. v. Bell Atlantic-New Jersey, Inc., et al.*, Civ. Nos. 97-5762(KSH) and 98-0109.

³ See *AT&T Communications of New Jersey, Inc., et al. v. Bell Atlantic-New Jersey, Inc., et al.*, Civ. Nos. 97-5762 and 98-0109 (KSH) (D.C.N.J. June 6, 2000) (hereinafter, *AT&T v. BA-NJ*).

⁴ See Decision and Order, *I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356 (March 6, 2002). ("Final Order").

⁵ See Decision and Order, *I/M/O the Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic-New Jersey, Inc.*, Docket No. TO00060356 (September 13, 2002). ("Order on Reconsideration").

⁶ *Verizon New Jersey Inc. v. the New Jersey Board of Public Utilities, an agency, and Jeanne M. Fox, in her official capacity as President of the New Jersey Board of Public Utilities, Frederick F. Butler, in his official capacity as Commissioner of the New Jersey Board of Public Utilities, Connie O. Hughes, in her official capacity as Commissioner of the New Jersey Board of Public Utilities, Carol J. Murphy, in her official capacity as Commissioner of the New Jersey Board of Public Utilities, and Jack Alter, in his official capacity as Commissioner of the New Jersey Board of Public Utilities*, Civil Action No. 02-5353 (JAP). MCI has filed a Counterclaim and a Cross-claim in the action pending in district court on December 20, 2002. VNJ and the Board filed Answers to MCI's Counterclaim and Cross-claim. By Orders dated March 21, 2003, the Court granted AT&T leave to intervene as intervenors and RPA leave to participate as *amicus curiae*.

⁷ Furthermore, on February 25, 2003, the Board filed a Motion to Dismiss Counts Two and Three. Supporting and responsive briefs have been filed with regard to that Motion to Dismiss Counts Two and Three.

On November 26, 2003, VNJ Filed a Motion for Leave to File and Serve an Amended Complaint expanding its complaint to include three additional counts. Proposed Counts Four and Five allege that the UNE rates established by the Board violate the Fifth and Fourteenth Amendments on additional grounds. Proposed Count Six alleges that the UNE rates adopted by the Board in the Order on Reconsideration are inconsistent with the Board's findings and are arbitrary, capricious, and unreasonable. MCI, AT&T and the Board filed response to the proposal by VNJ to amend its Complaint. No party has objected to VNJ's request to amend its Complaint as a procedural matter. However, various parties raised other comments and objections. The Board specifically reserved its right to fully respond to the allegations in an Answer to be filed following the Court's granting of leave for VNJ to file an Amended Complaint. VNJ's Motion for Leave to File and Serve an Amended Complaint is returnable on December 22, 2003.

In its Triennial Review Order (TRO), released on August 21, 2003, the Federal Communications Commission (FCC) has provided new, additional guidance to states that may affect the UNE rates established by the states in following the FCC's TELRIC-methodology. The FCC provided clarification on two key inputs used by states to set TELRIC-compliant rates: depreciation and cost of capital. Since VNJ's complaint is implicitly premised on its belief that these key inputs are not TELRIC compliant, the Board Staff entered into negotiations with VNJ to discuss the practicality of reviewing these inputs for TELRIC compliance as part of a joint settlement.

As a result of the joint settlement discussions and in an attempt to resolve the dispute without protracted litigation, the Board, at its December 17, 2003 Agenda Meeting, authorized its legal counsel from the Division of Law to execute a Stipulation and Agreement on behalf of the Board in Verizon New Jersey Inc. v. the New Jersey Board of Public Utilities, an agency, and Jeanne M. Fox, in her official capacity as President of the New Jersey Board of Public Utilities, Frederick F. Butler, in his official capacity as Commissioner of the New Jersey Board of Public Utilities, Connie O. Hughes, in her official capacity as Commissioner of the New Jersey Board of Public Utilities, Carol J. Murphy, in her official capacity as Commissioner of the New Jersey Board of Public Utilities, and Jack Alter, in his official capacity as Commissioner of the New Jersey Board of Public Utilities, Civil Action No. 02-5353 (JAP). According to the terms of the Stipulation and Agreement, VNJ has agreed to withdraw its Complaint, without prejudice, in exchange for an expedited review by the Board of the above-mentioned inputs that were used to calculate the current rates associated with UNEs that VNJ is required to provide to CLECs. The Stipulation and Agreement containing the detailed joint settlement agreement will be filed with the district court and will serve as a formal request by VNJ and the Board to have the case pending in district court dismissed.

Based upon the foregoing, and in accordance with the terms of the Stipulation and Agreement, the Board is reopening the UNE proceeding to review the cost of capital and depreciation inputs that were relied upon by the Board in setting the current UNE rates. Based upon the recent guidance provided by the FCC, the Board **HEREBY** initiates an expedited review of the aforementioned inputs. In addition, the Board **DIRECTS** Staff to evaluate the feasibility of retaining a third-party consultant to re-run the cost models with the revised inputs and/or assist in evaluating whether the revised inputs and assumptions utilized in the model re-runs are consistent with Board-approved directives.

In order to ensure the timely completion of the expedited review, the Board **HEREBY APPROVES** the attached procedural schedule. The Board **FURTHER DIRECTS** the

parties to provide cost model runs with revised cost of capital and depreciation inputs utilizing the previously approved cost models at the time of filing their initial (VNJ) and rebuttal (other interested parties) prefiled testimony. Furthermore, at the time of submission, any cost model runs filed for consideration with the Board shall include (in both hard copy and electronic format) all supporting worksheets and documentation utilized by the parties in the development of the proposed rates. Such documentation must be made available to all parties and Board Staff. VNJ is also hereby **DIRECTED** to provide to Board Staff and make available to any requesting party to the proceeding by January 5, 2004 all the necessary cost models and detailed installation instructions to enable Staff and the other parties to install, replicate and perform alternative cost model runs utilizing VNJ's cost models.

Lastly, the Board designates Commissioner Hughes as the Presiding Commissioner in the case. In further recognition that certain schedule modifications may be necessary, the Presiding Commissioner, in consultation with the President of the Board, will be vested with the authority to revise the schedule as may be necessary.

DATED: **12/23/03**

BOARD OF PUBLIC UTILITIES
BY:

(SIGNED)

JEANNE M. FOX
PRESIDENT

(SIGNED)

FREDERICK F. BUTLER
COMMISSIONER

(SIGNED)

CAROL J. MURPHY
COMMISSIONER

(SIGNED)

CONNIE O. HUGHES
COMMISSIONER

(SIGNED)

JACK ALTER
COMMISSIONER

ATTEST:

(SIGNED)

KRISTI IZZO
SECRETARY

New Jersey Board of Public Utilities
Division of Telecommunications
I/M/O the Board's Review of Unbundled
Network Elements Rates, Terms
and Conditions of Bell Atlantic-New Jersey, Inc.
Docket No. TO00060356

Procedural Schedule

VNJ Initial Testimony to be Filed	January 6, 2004
CLEC Initial Discovery Requests Due	January 9, 2004
VNJ Initial Discovery Responses Due	January 15, 2004
Rebuttal Testimony to be Filed	January 22, 2004
VNJ Initial Discovery Requests Due	January 27, 2004
CLEC Initial Discovery Responses Due	February 3, 2004
VNJ Surrebuttal to be Filed	February 6, 2004
CLEC Discovery on Surrebuttal Due	February 10, 2004
VNJ Surrebuttal Discovery Responses Due	February 13, 2004
Evidentiary Hearings	February 17 – 20, 23
Initial Briefs Due	February 27, 2004
Reply Briefs Due	March 5, 2004
Board Decision	March 31, 2004